88-1301

Supreme Court, U.S.
FILED
JAN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GIUSEPPE AND PIETRO PUGLIESE,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IVAN S. FISHER, P.C.
IVAN S. FISHER, ESQ.
*Attorney for Petitioner*
425 Park Avenue, 26th Floor
New York, New York 10022
(212) 935-7000

59

## QUESTIONS PRESENTED

1. Whether the Circuit Court's holding, affirming the sentencing court's finding that two sentences are to run consecutive where the oral pronouncement is silent on the subject, violates the basic rule found in most circuits, that silence carries with it the presumption that the sentences are to run concurrently.

2. Whether Petitioners' due process rights were violated where the sentencing court substantially enhanced their sentences based upon information that was highly inaccurate and unproven, and upon a new standard of "vicarious culpability" for the shooting of a government witness where they were admittedly not responsible for that shooting.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED..... | i |
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... | 2 |
| STATEMENT..... | 8 |
| REASONS FOR GRANTING PETITION... | 17 |
| CONCLUSION..... | 22 |
| APPENDIX A<br>Court of Appeals Opinion..... | 1a |
| APPENDIX B<br>Order Granting Enlargement of time..... | 23a |
| APPENDIX C<br>Judgment & Commitment Orders | 24a |
| APPENDIX D<br>Order, dated 3/2/88, Denying F.R.Cr.P. Rule 36, Motion..... | 30a |

## TABLE OF AUTHORITIES

Page

Cases:

Baca v. U.S., 383 F.2d. 154 (10th Cir. 1967)..... 17

United States v. Fatico, 603 F.2d. 1053 (2d. Cir. 1979)..... 20

United States v. Lee, 818 F.2d. 1052 (2d. Cir. 1987)..... 20

United States v. Pugliese, 805 F.2d. 1117, (2d. Cir. 1986)..... 8, 20

United States v. Tafoya, 757 F.2d. 1522 (5th Cir. 1975) cert. den. 106 S.Ct. 252 (1985)..... 18

United States v. Wenger, 457 F.2d. 1082 (2d. Cir. 1972)..... 17

STATUTES AND OTHER AUTHORITIES:

18 U.S.C. Sections 2, 371, 472, 473..... 8

FEDERAL SENTENCING GUIDELINES (SENTENCE REFORM ACT OF 1984;
28 U.S.C. Sect. 994(a)..... 14
Sect. 3B1.1(a)..... 14

FRCrP RULES 36, 43(a)..... 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

---

GIUSEPPE AND PIETRO PUGLIESE,
PETITIONERS,

v.

UNITED STATES OF AMERICA

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

Ivan S. Fisher, P.C., upon behalf of Giuseppe and Pietro Pugliese, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 1 - 14) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on or about October 17, 1988. On November 15th, Justice Thurgood Marshall extended the time within which to file a Petition for a Writ of Certiorari to January 15, 1989 (App. A, pg. 15). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and upon Supreme Court Rule 17.1(a) and (c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall ... be deprived of life, liberty, or property without due process of law ...

2. The Federal Rules of Criminal Procedure, Rule 32 (a)(1)(A)(B)(C) and 3(c)(1)(2) and (3) provides in pertinent part:

Rule 32. Sentence and Judgment

(a) Sentence.

(1) Imposition of Sentence.

Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall

(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

(B) afford counsel an opportunity to speak on behalf of the defendant; and
(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

The attorney for the government shall have an equivalent opportunity to speak to the court.

(c) Presentence Investigation

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The presentence report shall contain:

(A) any prior criminal record of the defendant;

(B) a statement of the circumstances of the commission of the offense and circumstances affecting the defendant's behavior;

(C) information concerning any harm, including financial, social, psychological and physical harm, done to or loss suffered by any victim of the offense; and

(D) any other information that may aid the court in sentencing, including the restitution needs of any victim of the offense.

(3) Disclosure.

(A) At a reasonable time before imposing sentence the court shall permit the defendant and his counsel to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation;

or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. The court shall afford the defendant and his counsel an opportunity to comment upon the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (3)(c)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant and his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government.

(D) If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into

account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

(E) Any copies of the presentence investigation report made available to the defendant and his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion, otherwise directs.

(F) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Parole Commission pursuant to 18 U.S.C. Sections 4205(c), 4252, 5010(e), or 5037 (c) shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

3. Federal Rules of Criminal Procedure, Rule 36 provides:

Rule 36. Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

4. Federal Rules of Criminal Procedure Rule 43(a) provides:

Rule 43. Presence of the Defendant

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

STATEMENT

In October 1985, after jury trial, Petitioner Giuseppe Pugliese was convicted by Judge Bramwell of the Eastern District of conspiracy to distribute counterfeit monies, and two other substantive counts of counterfeiting; Pietro was convicted on the conspiracy count, as well as on a count of possession of counterfeit monies (18 U.S.C. Sect. 2, 371, 472, 473; See U.S. v. Pugliese, 805 F.2d. 1117 (2d. Circ. 1986); hereinafter called "Pugliese I")). These convictions stemmed from their participation in the distribution of counterfeit $50 bills, in which approximately $400,000 to $500,000 in such bills were seized.

Both Petitioners were sentenced on December 3, 1985 by Judge Bramwell. Giuseppe was sentenced to 15 and 10 years on the respective counts, with sentences imposed consecutively, for a total sentence

of 30 years. Pietro was sentenced to 5, 15, 10 and 10 years on counts 1 through 4 respectively, with counts 1 through 3 imposed consecutively with each other, but concurrently to count 4, so that he also received a total sentence of 30 years.

On appeal from those convictions, the Second Circuit, as reported in Pugliese I, supra, reversed, vacating the sentences and remanding for sentencing before another Judge, based upon its holding that Judge Bramwell improperly enhanced sentences based upon a fixed and biased view of the accuracy of the presentence reports which had alleged Petitioners' involvement in the shooting of a Government witness. This Court did not determine the question of Giuseppe's involvement in the shooting, but directed the District Court to reconsider any relevant evidence on the question.* (* see p.10)

On remand, the Sentence Proceedings were assigned to Judge Sifton, before whom a hearing was held on April 22, 23 and 24, 1987. Again, the Government presented evidence in an attempt to substantiate, for enhancement purposes, that Petitioners were involved in, or were otherwise responsible for the shooting incident. The Government never made the claim, nor did the presentence reports reflect that Petitioners were members of a criminal organization as would justify enhancement of their sentences.

At the conclusion of the hearing, the Court found the Government's evidence insufficient to establish any complicity on

---

* (p. 9)
As regards Pietro, this Court noted that the Government had admitted that there was no evidence to show that he was involved in this shooting, since he was not a co-defendant before Judge Wexler when the "Fatico" evidence was taken, and in any event the evidence did not show his involvement.

the part of either Petitioner, stating (Mins., 12/9/87, pp. 10 - 11):*

> "I am unable to find by a preponderance of the evidence that either defendant ordered, directed, or authorized the shooting of Vincent Quagliata".

However, the Court refused to strike from the report or from its consideration the subject of the Quagliata shooting, upon the theory that the Pugliese could be held criminally responsible solely by virtue of their alleged membership in an organization, the ethics of which was the intimidation of Government witnesses. Since other members of this alleged group, motivated by this

---

* The Government again admitted that there was insufficient evidence to link Pietro to the shooting; it urged however that he should be held responsible in any event since he was purportedly an intended beneficiary of the shooting who had neither sought to prevent it nor aid in its investigation, an argument that was rejected by the court below (Govt's Sent. Memo, pp. 3 - 4).

ethic, were shown to have carried out the shooting, the Court ruled that the Puglieses could be held "levelly accountable" for the shooting (Mins., 1/6/88, pp. 16 - 17).

Thus, the Court made the following findings (Mins., supra, 12/9/87, pp. 11 - 12):

> "I also find that it was an aspect, a characteristic of this group, well-known to the defendants or perhaps it's best called an ethic of this group that members of the group would not cooperate with law enforcement. And further it was a characteristic of this group known to the defendants that that ethic was to be enforced by threats and violence, and that as a consequence of the existence of that ethic Mr. Quagliata was shot. As I say, not at the direction or with the approval of either of these defendants, but clearly as a result of the organization and ethic and operation of the group."

And notwithstanding the Court's statement that it would not (Mins., supra, 12/9/87, pp. 13 - 14):

> "sentence either of these defendants for the misconduct of others";

The Court did just that when at sentence it stated (Sent. Mins., supra, 1/6/88, pp. 16 - 17):

> "because of the assault with intent to commit murder with (a) dangerous weapon causing serious bodily injuries for which it seems to me based on the evidence I've heard both defendants are levelly accountable even though they did not themselves order it or it seems to me that that conduct is part of the relevant conduct that ought to be taken into account in determining the appropriate guidelines."*
>
> (Parenth. & Emphasis Added)

The Court imposed an aggregate sentence of 20 years for Giuseppe, as follows:

5, 15 and 10 years on the respective counts; the 10 year term to run concurrently with the terms imposed under the

---

* Defense counsel had urged that although the new Sentencing statute was not then in effect, that it could be used for guidance purposes; in this regard the relevant conduct of Giuseppe Pugliese as "organizer or leader of a criminal activity that involved 5 or more participants" was noted as adding

first two counts, which were to run consecutively with each other; plus an aggregate fine of $15,000 and a special statutory assessment of $150.

Pietro Pugliese was sentenced to an aggregate sentence of 15 years, as follows:

5 years on Count 1; 10 years on Count 2, to run consecutively to each other; 10 years on Counts 3 and 4 respectively, to run concurrently with the terms under Counts 1 and 2, with fines totalling $15,000, and a $200 statutory special assessment. (Mins., 1/6/88, pp. 17 - 18).

---

* (continued from previous page) 4 points to the base level under Sect. 3B1.1(a) - since the total of 22 points would result in a sentence of between 41 to 51 months, it is obvious that the Court's consideration of Pugliese's leadership of this alleged group enhanced his sentence far beyond the sentence guidelines for such conduct. (See Fisher letter to the Court, 12/11/87).

Regarding Giuseppe's sentence, the Court was silent as to whether the sentence it imposed would run consecutively to the earlier sentence imposed by Judge Wexler for Giuseppe's narcotics conviction. However, when the Court, some 5 days later, issued its written Judgment and Commitment Order, it provided for consecutive sentences, because as the Court later stated, that is what it had intended to do.* (See Judgment and Commitment Order, dated 1/11/88; Mins. 3/1/88, pg. 5).

Petitioner Giuseppe then moved under F.R.C.P. Rule 36 to correct the written Judgment and Commitment Order to properly

---

* Indeed, but for the Court's assumption that the 10-year sentence was a consecutive sentence, the Court would have imposed a sentence totalling 30 years (Mins. 3/1/88, pg. 4). It is significant to note that this is precisely the same sentence Judge Bramwell imposed upon the erroneous finding of Petitioner's complicity in the Quagliata shooting.

comport with the Oral Pronouncement of Sentence. The motion was denied upon the Court's holding that, although unexpressed, it had been the Court's intention to impose the new sentence consecutively to the earlier sentence, and that the failure to state its intent was attributable to the failure of the parties to bring it to the Court's attention. The Court further held that in any event there was an "ambiguity" created by the chronology of sentencing proceedings, justifying clarification in the written sentence, and that defense counsel's awareness of the Court's actual intent estopped Petitioner Giuseppe from urging concurrency of sentence. (Mins., 3/1/88, pp. 3 - 5).

REASONS FOR GRANTING PETITION

This case presents an important question concerning Petitioner Giuseppe Pugliese's sentence over which the appeals circuit courts are divided, warranting resolution by this Court.

That is, what presumption attaches to the silence of the court in its oral pronouncement of sentence on the question of consecutivity.

The vast majority of circuit courts (including the Second Circuit) have held that where the oral pronouncement is silent, there is a presumption that the sentences are concurrent. Where there is an ambiguity in the oral pronouncement, it can be clarified in the written commitment order to render the sentence consecutive (U.S. v. Wenger, 457 F.2d. 1082 (2d. Cir. 1972); Baca v. U.S., 383 F.2d. 154 (10th Cir. 1967)).

And, only the 5th Circuit has held

that silence alone creates an ambiguity that can be clarified in the written Judgment and Commitment Order. (U.S. v. Tafoya, 757 F.2d. 1522 (5th Cir. 1975) cert. denied, 106 S.Ct. 252 (1985)).

Here, the sentencing court said nothing about whether the sentence it imposed would be concurrent or consecutive to the earlier sentence already being served by Giuseppe Pugliese. Yet, in upholding the sentence by finding that there was somehow an ambiguity and that the sentencing court in reality intended to run these sentences consecutively, the Second Circuit in the opinion below now appears to have ruled in the same manner as did the 5th Circuit, i.e. that silence can somehow result in consecutive sentences despite the presumption of concurrency of sentences found in

The sentence is the most important aspect of our criminal justice system, for it is the end result of all that has preceded it in bringing the accused to justice and vindicating society's rights while protecting the constitutional due process rights of the accused.

The judgment should be certain and free of doubt. Resort to later written sentences where the oral pronouncement is free of ambiguity would violate this principle and serve to create instability in this vital sentencing process, particularly where the circuit courts are not uniform in their holdings.

To resolve this inconsistency in holdings and establish a uniform principle, this Court should grant certiorari.

This case also presents important questions of whether Petitioners were denied their constitutional due process

tially enhanced based upon information which was materially untrue and unproven.

The Second Circuit has interpreted RFCP Rule 32 as giving the sentencing court a wide scope as to the kinds of information it may consider for sentencing purposes. However, that information must be proven accurate and reliable. (U.S. v. Pugliese, 805 F.2d. 1117 (2d. Cir. 1986)).

The Second Circuit has also consistently held that an accused's due process rights are violated when the sentence enhancement is based upon misinformation or materially false assumptions. (U.S. v. Lee, 818 F.2d. 1052 (2d. Cir. 1987)).

To support sentence enhancement, the information utilized by the sentencing court must be proven by at least a preponderance of the evidence (U.S. v. Fatico, 603 F.2d. 1053 (2d. Cir. 1979); U.S. v. Lee, supra).

Here, as the sentencing court acknowledged, there was insufficient evidence upon which to find either Petitioner responsible for the shooting of a government witness. Yet, based upon flimsy evidence and assumptions about Petitioners' alleged participation or leadership in a purported criminal enterprise or group, the court found Petitioners equally (or "levelly") accountable as if they were responsible for the shooting.

Such a finding constituted an extreme departure from the above-cited principles governing "Fatico" hearings, and was a flagrant violation of Petitioners' due process rights as protected by our Constitution, warranting this Court's review.

Should the Second Circuit ruling be upheld, then a dangerous precedent will be set for future "Fatico" rulings, where an accused's associations with criminal elements or groups, without anything more,

will form the basis for sentence enhancement. Such a standard of criminal "vicarious culpability" violates basic principles of an accused's due process rights and should not go uncorrected by this Court.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

IVAN S. FISHER
Attorney for Petitioners
425 Park Avenue
New York, N.Y. 10022
(212) 935-7000

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1335- August Term, 1987

(Argued August 15, 1988
Decided October 17, 1988)

Docket Nos. 88-1018, 88-1020, 88-1099

---

UNITED STATES OF AMERICA,

Appellee,

v.

GIUSEPPE PUGLIESE and PIETRO PUGLIESE,

Defendants-Appellants.

---

Before: WINTER and MINER, Circuit Judges,
BILLINGS*, District Judge.

---

* Hon. Franklin S. Billings, Jr., U.S. District Judge for the District of Vermont, sitting by designation.

Appeal from a sentencing order of the United States District Court for the Eastern District of New York (Charles Sifton, Judge).

Affirmed.

IVAN STEPHEN FISHER, New York, N.Y. (Harvey B. Baum, New York, N.Y. of counsel)
For Defendants-Appellants

EPHRAIM SAVITT, Assistant United States Attorney, Eastern District of New York, Brooklyn, N.Y. (Andrew J. Maloney, United States Attorney for the Eastern District of New York, John Gleeson, Assistant United States Attorney, Brooklyn, N.Y. of counsel)
For Appellee

Billings, District Judge:

Defendants-appellants Giuseppe Pugliese and Pietro Pugliese appeal from sentences imposed in the United States District Court for the Eastern District of New York (Charles Sifton, Judge). Defendants-appellants argue in this appeal that the district court abused its discretion in enhancing their sentences. Defendants first argue that the district court's findings of fact were unsupported by the evidence presented at the presentence hearing; and second, that they were improperly held criminally responsible for the acts of others. Defendant-appellant Giuseppe Pugliese also appeals from denial of his post-sentence motion to correct the written Judgment and Commitment Order to properly comport with the sentencing court's earlier oral pronouncement of sentence. Because we find

the district court properly considered evidence of defendants' involvement in a criminal organization and properly clari fied an ambiguity in the oral pronounce- ment of sentence through the written judgment and commitment order, we affirm

BACKGROUND

After jury trial in October, 1985, defendants Giuseppe Pugliese and Pietro Pugliese were convicted on counterfeitin charges stemming from their participatio in the distribution of counterfeit fifty dollar bills. On December 3, 1985, Judg Bramwell sentenced each defendant to a total sentence of thirty (30) years. On appeal, this Court vacated the sentences imposed by Judge Bramwell (United States District Court for the Eastern District of New York) and remanded the case for resentencing to another district court judge for the Eastern District of New

York. United States v. Pugliese, 805 F.2d. 1117 (2d Cir. 1986). In Pugliese, we concluded that prior to examining Fatico materials, the district court had expressed a "fixed view" that defendants had participated in some way in the shooting of Vincenzo Quagliata, a government witness. In remanding the case for resentencing, we indicated that we were not adjudicating defendants' claim that they had not been involved in the shooting. Rather, we directed the district court to consider all relevant evidence linking defendants with the murder attempt.

On April 22-24, 1987, Judge Sifton conducted a pre-sentence hearing concerning the allegations of defendants' responsibility for the shooting. Subsequently, at a hearing held on December 9, 1987, Judge Sifton found the government had not established that either

defendant had ordered, directed, or autho-
rized the shooting of Vincenzo Quagliata.
Nonetheless, he denied defendant's motion
to strike all reference in their pre-
sentence reports to the attempted murder
because he found the evidence established
that:

1) Both defendants were members of, and Giuseppe Pugliese was a leader of, a criminal group or organization which engaged in large scale criminal activities over a substantial period of time;

2) A characteristic or "ethic" of this group was that its members would not cooperate with law enforcement;

3) The ethic was enforced by threats and violence; and

4) Vincenzo Quagliata was shot as a consequence of the ethic.

In imposing sentence on January 6,
1988, Judge Sifton stated that the sen-
tences would reflect his determination
that both defendants were "levelly
accountable" for the shooting of Quag-

liata by virtue of their membership and participation in the criminal organization responsible for the shooting.

Judge Sifton then imposed an aggregate sentence of twenty (20) years on Giuseppe Pugliese as follows: 5, 15 and 10 years on the respective counts. The 10 year term was to run concurrently with the terms imposed under the first two counts. The terms imposed under the first two counts were to run consecutively with each other. Judge Sifton also imposed an aggregate fine of $15,000 and a statutory special assessment of $150.

Judge Sifton imposed an aggregate sentence of fifteen (15) years on Pietro Pugliese as follows: 5 years on Count 1; and 10 years on Counts 2, 3, and 4. Counts 1 and 2 were to run consecutively. Counts 3 and 4 were to run concurrently with the terms under Counts 1 and 2.

Judge Sifton also imposed an aggregate fine of $15,000 and a statutory special assessment of $200.

A Judgment and Commitment Order issued January 11, 1988, provided that the term of imprisonment imposed on Giuseppe Pugliese was to run consecutively to a sentence imposed by Judge Leonard Wexler for an earlier narcotics conviction in the Eastern District of New York. Defendant Giuseppe Pugliese moved, pursuant to Fed. R. Crim. P. 36, to correct the Judgment and Commitment Order to conform to the oral pronouncement of sentence. Contending that the oral pronouncement of sentence did not indicate that it was to run consecutive to the 10 year sentence previously imposed by Judge Wexler, defendant Giuseppe Pugliese argued that because the Judgment and Commitment Order con-

flicted with the prior oral pronouncement, the terms of the oral pronouncement controlled.

On March 1, 1988, Judge Sifton denied the motion, holding that he had intended to impose sentence consecutively to the earlier sentence and accordingly had reduced the sentence by the amount of time Judge Wexler had imposed. In addition, he found that an ambiguity was created by his reference during the oral pronouncement to Judge Wexler's earlier sentence for narcotics dealing. Judge Sifton held that the ambiguity was properly clarified in the written Judgment and Commitment Order.

## DISCUSSION

### I. Enhancement of Defendants' Sentences

Defendants argue that their sentences were improperly enhanced because there was no evidence to support the finding of their membership or participa-

tion in the criminal organization responsible for the Quagliata shooting. Even assuming the evidence supporting such a finding, defendants argue that their sentences were improperly enhanced because they cannot be held vicariously responsible for the acts of others simply by reason of their association with that group.

A. Sufficiency of the Evidence

As this Court held in Pugliese, a sentencing court "has an obligation to assure itself that the information upon which it relies in sentencing defendants is both reliable and accurate." Id. at 1124. The government has the burden of proving disputed pre-sentence report allegations by a preponderance of the evidence. United States v. Lee, 818 F. 2d 1052, 1057 (2d Cir.), cert. denied, 108 S. Ct. 350 (1987). In reviewing the district court's factual finding that

defendants were members of the criminal organization responsible for shooting Quagliata, we must affirm unless such finding of fact is clearly erroneous. Id. at 1058.

On April 22-24, 1987, the district court conducted a hearing concerning the allegations in the pre-sentence report relating to defendants' responsibility for the shooting. In support of the allegations the government presented the testimony of Gerald Williams, Vincenzo Quagliata, and Michael Doyle. The government also offered into evidence transcripts of tape recorded conversations between Michael Doyle and Carmello Lovacco.

United States Secret Service Special Agent Gerald Williams testified concerning the criminal history of the defendants which included threats of violence, witness intimidation, and obstruction of

justice.

Specifically, Special Agent Williams testified that following their separate arrests, Nicolo Atria and Michelangelo Causi, distributors of defendants' counterfeit money, agreed to cooperate with the Secret Service in the investigation of defendants. Atria and Causi obtained recorded incriminating conversations from appellants. However, neither Atria nor Causi ever testified against defendants. Atria failed to appear at a scheduled trial of Pietro Pugliese and advised Secret Service agents that Giuseppe Pugliese gave him $1,000 and ordered him to leave town and not testify against Pietro. Causi refused to testify and, through his attorney, informed government agents that he was afraid to testify. As a consequence, an earlier counterfeiting case against appellants was dismissed.

In May, 1984, federal agents arranged to interview Atria in an attempt to again solicit his cooperation. While in the United States Marshal's pen awaiting the interview, Atria accidently met Giuseppe Pugliese who had just been arrested on heroin trafficking charges. After that contact with Giuseppe Pugliese, Atria informed the agents that he would not cooperate with the government.

Ballistics tests conducted by the New York City Police Department demonstrated that the handgun used in the Quagliata shooting had also been used to murder Salvatore Parrino, a night watchman employed by Giuseppe Pugliese's Trinacria Construction Company.

Vincenzo Quagliata agreed to cooperate with the government in its investigation of defendants. Following Quagliata's testimony before a grand jury, an indictment was returned against defen-

dants for the 1982 counterfeiting violation. At the pre-sentence hearing, Quagliata testified that Tony Lipari told him that if he testified against Giuseppe and Pietro Pugliese, they would "blow his brains out". Quagliata described Tony Lipari as Giuseppe Pugliese's bodyguard. Quagliata also testified that the Puglieses had two lawyers, one of whom was also Quagliata's lawyer. During preparations for Quagliata's trial, both of the lawyers in the presence of the Puglieses, instructed him to testify that Nicolo Atria had given him the counterfeit money. The truth, Quagliata testified, was that Giuseppe and Pietro Pugliese had given him the money. When Quagliata asked if Atria would testify against him, Pietro Pugliese told him not to worry, as Atria would not come to court because Giuseppe had given Atria $1,000.

Michael Doyle began cooperating with

the government following his arrest for unlawful possession of firearms in 1985. In the course of Doyle's association with several organized crime crews in Brooklyn, New York, he worked with and became a friend of Carmello Lovacco. Doyle testified to information he learned from Lovacco concerning a criminal organization of which Giuseppe Pugliese was the "big man" who ran the whole Sicilian crew. He also learned that Pietro Pugliese was a member and participant in the same criminal organization. Doyle also learned of the criminal group's attitude toward "rats" or government informants and its willingness to use violence to prevent individuals from testifying. Lovacco told Doyle that he had driven the car involved in the Quagliata shooting and in the course of that conversation asked Doyle if a newspaper article concerning the shoot-

ing had mentioned the name Pugliese.

The foregoing testimony details defendants' involvement with other individuals in organized criminal activities, including counterfeiting, witness intimidation, and obstruction of justice. In addition, the testimony of Michael Doyle reveals Giuseppe Pugliese's role as the :big man" or leader of the criminal organization. Taken as a whole, the testimony of these witnesses provides a basis for concluding that the criminal group of which defendants were members, and Giuseppe Pugliese was the leader, operated under a principle of conduct or "ethic", enforced by threats and violence, of preventing witness cooperation, and that the shooting of Quagliata resulted from the operation of this "ethic". Therefore, we find the district court's factual determinations are supported by the record and thus not clearly erroneous.

B. Association with a Criminal Group

Defendants contend that even if the evidence were sufficient to find that defendants were members of a criminal association, it was improper for the district court to impose enhanced sentences, given that there was no finding of their criminal responsibility for the shooting of Quagliata.

The purpose of the pre-sentence hearing was to determine whether information contained in the pre-sentence report was accurate and reliable. That information permits the sentencing judge to "gain a fuller assessment of the defendant so that the punishment will '"fit the offender and not merely the crime"', for which he was convicted." United States v. Hansen, 701 F.2d 1078, 1082 (2d Cir. 1983)(quoting North Carolina v. Pearce, 395 U.S. 711, 723 (1969)(quoting Williams v. New York, 337 U.S. 241, 247 (1949))).

In fashioning a sentence to fit the offender, "a sentencing judge has wide latitude in taking into consideration all matters bearing upon the personal history and behavior of the convicted accused." Billiteri v. United States Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976). Thus, a sentencing judge may properly consider the past conduct, lifestyle, criminal associations, and moral propensities of defendants.

Because the government had established by a preponderance of the evidence that both defendants were members of, and Giuseppe Pugliese was a leader of, a criminal group or organization whose ethic of non-cooperation with the government was enforced by threats and violence and resulted in the shooting of Quagliata, the district court properly considered this information in imposing sentence on defendants.[1]

II. Imposition of Consecutive Sentences

Defendant Giuseppe Pugliese contends that because the oral pronouncement of sentence did not specify whether it was to be concurrent with or consecutive to his existing ten year heroin sentence, the district court improperly modified the sentence by providing for consecutive service of sentence in the Judgment and Commitment Order.

"(A)n all but conclusive presumption does not exist in federal sentencing that unless otherwise stated a sentence imposed on a given count or indictment is concurrent with other federal sentences then imposed or previously imposed." United States v. Wenger, 457 F.2d 1082, 1083 (2d Cir.), cert. denied, 409 U.S. 843 (1972). Specifically, if an earlier sentence is not referred to by a sentencing judge, the later sentence is presumed to be concurrent to the earlier

one. Id. In the event a variance exists between an unambiguous pronouncement of sentence and the written judgment and commitment, the oral pronouncement must control. United States v. Marquez, 506 F.2d 620, 622 (2d Cir. 1974). When, however, there is genuine doubt concerning the oral pronouncement of sentence, "(a) commitment order may properly serve the function of resolving ambiguities in the orally pronounced sentence()." United States v. Moyles, 724 F.2d 29, 30 (2d Cir. 1983); United States v. Villano, 816 F.2d 1448 (10th Cir. 1987).

In the present case, both the district court judge and defendant's counsel referred to the sentence previously imposed on defendant for a narcotics trafficking conviction. The district court judge did not state explicitly whether the sentence being imposed was to be consecutive to or concurrent with

the earlier sentence. He indicated, however, that he intended to disregard the considerations that had led to the existing sentence. Although the court referred to the previous sentence, its intention was not entirely clear. The district court's statement could be considered an indication that he intended to impose a sentence that would be separate from the sentence previously imposed for narcotics trafficking; in that case the two sentences would run consecutively.

Thus, at the very least, the district court's reference to the earlier narcotics sentence without an explicit statement of whether the sentence being imposed was to run consecutively or concurrently with the earlier sentence created an ambiguity which was properly clarified in the written judgment and commitment order. The district court's denial of defendant's motion to strike the provision for con-

secutive service from the judgment and commitment order is affirmed.

CONCLUSION

The sentences imposed by the district court are affirmed.

FOOTNOTE

1. We do note that Judge Sifton's statement that "based on the evidence I've heard both defendants are levelly accountable even though they did not themselves order it" is internally inconsistent. Appellants' Joint Appendix at 260-61. Unless defendants had ordered, directed, or authorized the shooting of Quagliata they could not be "levelly accountable", although they might bear moral responsibility. Judge Sifton did, however, make clear in previous and subsequent statements that he was not imposing sentence on the basis of the misconduct of others but was imposing an "appropriate sentence for the crimes that they have committed in the light of their involvement in the group that I have described and their own conduct, their own state of mind." Id. at 229. As indicated above, consideration of defendants' involvement in a criminal organization was entirely proper in determining an appropriate sentence to fit the offender.

SUPREME COURT OF THE UNITED STATES

No.

A-392

Giuseppe Pugliese and Pietro Pugliese,

Petitioners

v.

United States

---

O R D E R

---

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

January 15, 1989.

s/Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 15th day of November, 1988.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR-85-00194

AMENDED JUDGMENT

UNITED STATES OF AMERICA

v.

PIETRO PUGLIESE

*Defendant.*

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: January 6, 1988

COUNSEL

WITH counsel David Lewis, Esq.

FINDING & JUDGMENT

There being a verdict of GUILTY of counts (1), (2), (3) and (4). Defendant has been convicted as charged of the offense(s) of violating Title 18, U.S.C., Sections 371, 472, 473 and 2.

Pursuant to the Mandate of the Court of Appeals for the Second Circuit issued on November 21, 1986, the Order of Judgment and Commitment entered in this case on December 3, 1985 is hereby vacated.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody

of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on count (1) and is fined the sum of $10,000.00. On count (2), the defendant is to be imprisoned for a term of ten (10) years and is fined the sum of $5,000.00. The term of imprisonment and fine imposed on count (2) are to be consecutive to those imposed on count (1). On count (3), the defendant is to be imprisoned for a term of ten (10) years and fined the sum of $5,000.00. The term of imprisonment and fine imposed on count (3) are to be concurrent with those imposed on counts (1) and (2). On count (4), the defendant is to be imprisoned for a term of ten (10) years and is fined the sum of $5,000.00. The term of imprisonment and fine imposed on count (4) are to be concurrent with those imposed on counts (1), (2) and (3). The total sentence is a term of imprisonment of fifteen (15) years and a fine of $15,000.00.

In addition, the defendant is assessed the sum of $50.00 on each count pursuant to Title 18, U.S.C., Section 3013, for a total assessment of $200.00.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The Court orders commitment to the custody of the Attorney General and recommends.

It is hereby ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
U.S. District Judge

/s/ Charles Sifton

Charles Sifton

Date: March 9, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CR-85-00194-01

UNITED STATES OF AMERICA

v.

GUISEPPE PUGLIESE

*Defendant.*

*JUDGMENT AND PROBATION/COMMITMENT ORDER*

In the presence of the attorney for the government the defendant appeared in person on this date: January 6, 1988

COUNSEL

WITH counsel Ivan Stephen Fisher, Esq.

FIDING & JUDGMENT

There being a finding of GUILTY of counts (1), (2) and (3). Defendant has been convicted as charged of the offense(s) of violating Title 18, U.S.C., Sections 2, 371, 472 and 473.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on count (1) and is fined

the sum of $10,000.00. On count (2), the defendant is sentenced to imprisonment for a period of fifteen (15) years and fined the sum of $5,000.00. The term of imprisonment and fine imposed on count (2) are to be consecutive to those imposed on count (1). On count (3), the defendant is sentenced to a term of imprisonment of ten (10) years and fined the sum of $5,000.00. The term of imprisonment and fine imposed on count (3) are to be concurrent with those imposed on counts (1) and (2). The total sentence is a term of imprisonment of twenty (20) years and a fine of $15,000.00. The term of imprisonment is to run consecutively to that imposed by Judge Leonard Wexler of this court.

In addition, the defendant is assessed the sum of $50.00 on each count pursuant to Title 18, U.S.C., Section 3013, for a total assessment of $150.00

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period of within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The Court orders commitment to the custody of the Attorney General and recommends.

---

It is ordered that the clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

---

CERTIFIED AS A TRUE
COPY ON THIS DATE.

January 11, 1988

By /s/ Stanley Kessler

Stanley Kessler
Deputy (Clerk)

SIGNED BY
U.S. District Judge

/s/ Charles Sifton

Charles Sifton

Date: January 11, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-against- CR-85-00194-01

GIUSEPPE PUGLIESE

ORDER

----------x

The motion of defendant Giuseppe Pugliese to correct the Order of Judgment and Commitment entered on January 11, 1988 is hereby denied for the reasons stated on the record in open court on March 1, 1988.

SO ORDERED.

Dated: Brooklyn, New York
March 2, 1988

UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

----------x

GIUSEPPE AND PIETRO PUGLIESE,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

----------x

I, LOUIS BRITO, being duly sworn, depose and say:

1. I am not a party to the action.

2. I am over 18 years of age.

3. On January 14, 1989, I served the Petition for Certiorari on Andrew J. Maloney, Esq. United States Attorney, 225 Cadman Plaza East, Brooklyn, N.Y. 11201, attention Ephraim Savitt, Esq., Assistant United States Attorney, by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York

State.

4. On that same date I also served Mr. Charles Fried, Solicitor General, United States Department of Justice, Washington, D.C. 2o530, by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository, under the exclusive care and custody of the United States Postal Service within New York State.

LOUIS BRITO

Sworn to before me
this 13th day of January, 1989

Notary Public